

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 7:06-CR-58-FL-1
NO. 7:12-CV-237-FL

ORENTHAL JAMES MCINTYRE,)
)
Petitioner,)
)
v.) ORDER
)
UNITED STATES OF AMERICA,)
)
)
Respondent.)

This matter comes before the court on petitioner's motion pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct sentence (DE # 27). On September 24, 2012, the government filed a response to the motion, waiving its statute of limitations defense, and suggesting that the court reach the merits of the § 2255 petition.

On October 18, 2006, petitioner pled guilty, pursuant to a written plea agreement, to one count of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924. The court sentenced petitioner on January 29, 2007, to a term of 82 months' imprisonment, followed by a three-year term of supervised release. In light of United States v. Simmons, 649 F.3d 237 (4th Cir. 2011) (en banc), petitioner does not have a prior conviction of a crime punishable by imprisonment for a term exceeding one year. A necessary element of the crime of conviction is therefore lacking. See 18 U.S.C. § 922(g)(1). Where the government waives defenses and concedes that petitioner's motion to vacate sentence should be granted, and where the court, having reviewed the record, finds petitioner's motion meritorious, said motion is GRANTED, and the judgment of conviction and sentence dated January 29, 2007, is VACATED. Petitioner is ORDERED to be

released from federal custody, subject to pending detainees, if any, unless some cause be shown by the government on or before noon on October 31, 2012, why petitioner is not now entitled to this relief.

SO ORDERED, this the 30th day of October, 2012.



LOUISE W. FLANAGAN
United States District Judge